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80-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

Number

MARIA ISABEL CASAREZ-ULLOA, *aka* MARTA MOLINA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
to the
UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

BRIEF OF MARIA ISABEL CASAREZ-ULLOA, aka MARTA MOLINA, PETITIONER

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QUESTIONS PRESENTED

Whether the Government violated Petitioner's right to due process of law pursuant to the Fifth Amendment of the United States Constitution and Petitioner's right of compulsory process to obtain witnesses pursuant to the Sixth Amendment of the United States Constitution by unilaterally deporting seven of twelve illegal aliens arrested without affording Petitioner an opportunity to question the deported aliens.

Whether Petitioner's motion to dismiss was timely made.

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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1980

Number

MARIA ISABEL CASAREZ-ULLOA,
aka MARTA MOLINA,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner MARIA ISABEL CASAREZ-ULLOA, aka MARTA MOLINA requests that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Ninth Circuit entered on November 12, 1980, and September 11, 1980.

ORDER BELOW

On September 11, 1980, the MEMORANDUM decision of the United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Eastern District of California's denial of Petitioner's motion to dismiss based on United States v. Mendez-Rodriquez, 450 F2d 1 (Ninth Circuit, 1971).

The Court held that the oral motion made on the date of trial, when no excuse was presented, came too late, and the Respondents knew of the existence of the seven aliens since the time of the Petitioner's arrest. The untimeliness of the motion prevented the Government from taking any action to return them.

Additionally, the Court held that this was not a case in which the Government frustrated the defense in the preparation of its defense.

On November 12, 1980, the Court voted

unamiously to deny the motion for rehearing and to reject the suggestion for a rehearing en banc.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). Jurisdiction in the District Court was based upon Title 8, §1324(a)(3).

United States Constitutional Provisions

FIFTH AMENDMENT

"No person shall be deprived of life liberty, or property, without due process of law;"

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor."

QUESTIONS PRESENTED

Whether the Government violated Petitioner's

right to due process of law pursuant to the Fifth Amendment of the United States Constitution and Petitioner's right of compulsory process to obtain witnesses pursuant to the Sixth Amendment of the United States Constitution by unilaterlly deporting seven of twelve illegal aliens arrested without affording Petitioner an opportunity to question the deported aliens.

Whether Petitioner's motion to dismiss was timely made.

STATEMENT OF THE CASE

Petitioner was indicted on September 26, 1979, on five counts of knowingly harboring, concealing and shielding illegal aliens from the Border Patrol in violation of Title 8, U.S.C. §1324(a)(3).

Petitioner plead not guilty on October 1, 1979. The matter was set for trial confirmation on November 12, 1979, and jury trial on November 20, 1979.

On September 28, 1979, Petitioner was provided with certain discovery. On November 14, 1979, Petitioner's motion to continue the trail was granted and the trial confirmation was continued to January 14, 1980, and the jury trial to January 22, 1980.

On January 21, 1980, Petitioner substituted attorneys and the jury trial was continued to February 21, 1980. After substitution, it was discovered that aliens were mentioned in the Government's reports other than those mentioned in the indictment. Additionally, discovery was given to Petitioner; however, none dealing with the seven aliens not mentioned in the indictment.

During the week of February 14, 1980, Petitioner was orally advised by the Government that an additional seven aliens had been arrested along with the five that were detained and that the seven aliens had been voluntarily deported to Mexico. The Government had no specific addresses for these

aliens.

Additional discovery was provided to Petitioner setting out some of the names of the aliens voluntarily deported.

Prior to the jury trial of February 21, 1980, the Government was advised that a continuance would be requested and a motion to dismiss on the basis of United States v. Mendez-Rodriquez, 450 F2d 1 (Ninth Circuit, 1971) would be made. An oral agreement was made between Petitioner and the Government that the motion would be made at the time of trial which would be continued to February 28, 1980, and pending the outcome of the motion, the trial would be held on stipulated facts. The Clerk of the Court and Judge were notified of the agreement and the trial was continued to February 28, 1980.

Petitioner attempted to locate the deported witnesses and was successful in locating two, both of whom have given testimony favorable to

Petitioner. On February 26, 1980, Petitioner filed a motion for discovery and on February 27, 1980, the Government filed its written motion opposing the motion to dismiss that was to be heard on February 28, 1980.

On February 28, 1980, Petitioner's motion was denied, the Petitioner was found guilty and sentenced to five (5) years in custody on the condition she serve the first one hundred seventy-nine (179) days in jail with the balance sentence for a 4-1/2 year term of probation.

Petitioner filed an appeal of the decision of the District Court to the United States Court of Appeals for the Ninth Circuit. The appeal was denied on September 11, 1980, and the Petition for Rehearing with a suggestion for Rehearing En Banc was denied November 12, 1980.

The specific facts regarding this case are as follows:

A Fresno County Deputy Sheriff arrested between four to seven female illegal aliens in Room 35 of the Palms Motel. The Deputy Sheriff went to Room 36 and arrested between four and seven female illegal aliens. The Petitioner drove up to the scene at this time and was arrested. The illegal aliens and the Petitioner were put in a Border Patrol van. The Deputy Sheriff went to Room 22 and arrested three more illegal aliens. All names of the illegal aliens were not recorded by the Deputy Sheriff; however, they were all put in a van and taken to the Border Patrol office. The Deputy Sheriff did not know which aliens came from which room and did not know which aliens were returned to Mexico.

All the aliens were interviewed by the Border Patrol and those that denied knowing Petitioner were voluntarily deported while the five that gave statements allegedly implicating the Petitioner, were detained. Formal statements were only taken from those

that implicated the Petitioner. Addresses of the illegal aliens returned were not obtained by the Border Patrol.

White at the Border Patrol office, a wife of a Border Patrol agent, acting as a matron, testified that she heard Petitioner tell all twelve female illegal aliens that if anybody asked if they knew her, they were to deny knowing her.

Petitioner attempted to locate the deported aliens and was able to locate two; both of whom denied that the Petitioner made the statement at the Border Patrol office. Both deported aliens indicated they knew the five aliens mentioned in the indictment and had seen them at the motel.

REASONS FOR GRANTING THE WRIT

By denying Petitioner's appeal, the Court of Appeals for the Ninth Circuit denied Petitioner's right to due process as guaranteed by the Fifth Amendment of the United States Constitution

and Petitioner's right of compulsory process as guaranteed by the Sixth Amendment of the United States Constitution.

The Fifth Amendment to the United States Constitution in relevant part provides that no person shall be deprived of life, liberty, or property without due process of law.

The Sixth Amendment to the United States Constitution provides in relevant part that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and to have compulsory process for obtaining witnesses in his favor.

This Court has stated in Washington v. Texas, 388 U.S. 14, at pages 18-19, 87 S.Ct. 1920, at page 1923, 18 L.Ed.2d 1019 (1967):

> "The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that

we have previously held applicable to the States. This Court had occasion in In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.682, (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:

'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in Court - are basic in our system of jurisprudence; and these rights indeed, as a minimum, a right to examine the witnesses against him, to offer testimony and to be represented by counsel.'" 333 U.S. at 273, 68 S.Ct. at 507.

The question to be decided is not a complex question nor would it be setting precedent. Clearly, the Appellate Court was in error in not finding that the Government violated the rights of the Petitioner as set out hereinabove. In United States v. Mendez-Rodriquez, 450 F2d 1, (Ninth Circuit, 1971)

which is the controlling case in the Ninth Circuit, the Court there held that the Government violated the Defendant's Fifth and Sixth Amendment rights when it deported and made unavailable to the Defendant three of the six aliens arrested along with the Defendant without giving the Defendant an opportunity to examine them. In Mendez-Rodriquez, supra, the Defendant conceded he did not know if the deported witnesses would have given favorable testimony. In the instant situation, at least two of the witnesses could have given favorable testimony.

The Court of Appeals for the Ninth Circuit in United States v. Tsutagawa, 500 F2d 420 (Ninth Circuit, 1974) relied on the Mendez-Rodriquez decision wherein the Government arrested 39 aliens and retained four after a grand jury investigation. Again, the Respondent was not afforded the opportunity to examine the deported aliens. The Court stated that the vice lies in the unfettered ability

of the Government to make the decision unilaterally as to which witnesses will not help either side and then release those witnesses, for all practical purposes, beyond the reach of the Respondent.

The Ninth Circuit in United States v. McQuillan, 507 F2d 30, 33 (Ninth Circuit, 1974), recognized that the Respondent must show that the unavailable aliens might have been actual witnesses to the crime for which the Respondent's have been charged. In relating the McQuillan case to the Petitioner's, it is clear that they were actual witnesses in that they were present when an allegedly incriminating statement had been made at the Border Patrol office by the Petitioner, they had lived at the same motel as the detained aliens, some of them knew the Petitioner and the aliens that had been detained.

All these factors indicate that the unilateral deportation of these witnesses by the Government without affording the

Petitioner the opportunity to interview them, seriously hampered Petitioner's case.

The Ninth Circuit as a basis for its decision held that the Motion to Dismiss had not been timely made. This finding had been made under the apparent belief that the Petitioner did not request a motion for a continuance once it was discovered that additional aliens had been arrested. As indicated in the declaration attached to the APPENDIX herein, neither the Assistant United States Attorney nor Petitioner's attorney knew there had been an additional report made out until approximately one week before the trial date set for February 21, 1980. Once this was discovered, an oral agreement was entered into between Petitioner's attorney and the Assistant United States Attorney with the concurrence of the Court. The Ninth Circuit refused to allow a Supplementation of the record which would have demonstrated what reports and discovery had

been in the possession of the Petitioner. These would have shown that it was not clear that additional aliens had been involved that could and should have been witnesses favorable to the Petitioner.

CONCLUSION

The Government's unilateral action in deporting to Mexico seven of the twelve aliens arrested without giving Petitioner the opportunity to interview them, clearly violated Petitioner's right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution and Petitioner's right to compulsory process as guaranteed by the Sixth Amendment of the United States Constitution.

The Ninth Circuit's holding that the motion to dismiss was untimely was based on the erroneous belief that there had not been a motion to continue the trial once it was discovered that certain aliens had been

deported that had been arrested with the Petitioner.

The Petitioner has no other recourse, other than the highest Court of this Country in which to seek relief. The law is clear and the decision of the Ninth Circuit is clearly based on incorrect facts.

Dated, Fresno, California

January 8, 1981

Respectfully submitted,

Anthony P. Capozzi

Attorney for Petitioner,

MARIA ISABEL CASAREZ-ULLOA, aka MARTA MOLINA

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MARIA ISABEL CASARES-ULLOA,
aka MARTA MOLINA,

Defendant-Appellant.

FILED

SEP. 11, 1980

RICHARD H. DEANE,
Clerk

No. 80-1133

CD# CR F-79-132

MEMORANDUM

Appeal from the United States District Court
for the Eastern District of California
M. D. Crocker, presiding judge
Submitted September 8, 1980

Before: WRIGHT and FERGUSON, Circuit Judges,
and BROWN,*District Judge

Defendant appeals from her conviction on five counts of harboring illegal aliens. She asserts that her fifth and sixth amendment rights were violated when the government

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*The Honorable Wesley E. Brown, Senior United States District Judge, District of Kansas, sitting by designation.

deported to Mexico seven illegal aliens who were arrested together with her and those she was charged with harboring but who denied knowing her.

We affirm the district court when it denied a motion to dismiss based on United States v. Mendez-Rodriquez, 450 F.2d 1 (9th Cir. 1971). The oral motion made on the date of trial, which trial was determined upon stipulated facts, came too late, when no excuse was presented and the defendant knew of the existence of the seven since the time of her arrest. The untimeliness of the motion prevented the government from taking any action to return them.

This is not a case in which prosecution frustrated the defense in the preparation of its defense. United States v. Mendez-Rodriquez, supra, 450 F.2d at 5.

The convictions are affirmed.

Bail is revoked and the mandate shall issue forthwith.

EXHIBIT "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MARIA ISABEL CASARES-ULLOA,
aka MARTA MOLINA,

Defendant-Appellant.

FILED

NOV. 12, 1980

RICHARD H. DEANE,
Clerk

No. 80-1133

DC# CR F-79-132

Before: WRIGHT and FERGUSON, Circuit Judges, and BROWN,*District Judge

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Wright and Ferguson have voted to reject the suggestion for a rehearing en banc, and Judge Brown has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised on the suggestion for en banc rehearing and no judge

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*Honorable Wesley E. Brown, Senior United States District Judge, District of Kansas, sitting by designation.

of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

EXHIBIT "B"

DECLARATION OF ANTHONY P. CAPOZZI

I, ANTHONY P. CAPOZZI, declare and state that:

1. I am admitted to practice law before the Supreme Court of the United States, United States Court of Appeals for the Ninth and Fifth Circuits, the United States Tax Court, and have been admitted to practice law in the states of Ohio, Illinois and California.

2. I had been substituted in as the attorney for Appellant MARTA MOLINA on January 21, 1980, in place of Gilbert Lopez.

3. After having been substituted in for Mr. Lopez, the jury trial was continued to February 21, 1980. I reviewed the material that had been in the possession of Appellant's prior attorney, Mr. Lopez. I discovered on the RECORD FOR DEPORTABLE ALIEN OF ALIENS Florentina Vargas-Apariso, Victoria Cespedes-Ventury and Jacinta Jimenez-Aparicio three short comments as follows:

"Subject along with 13 other illegal females was detained by Detectives Nicolas and Sample in the investigation of a burglary and held for U.S.B.P."

"Subject and 12 others were detained for U.S.B.P. by Detectives Sample and Nicholas who were there investigating a burglary."

"Subject was 1 of 13 who were detained by Detectives Sample and Nicholas who were detained at the Motel investigating a burglary."

Included in the discovery were reports from Deputy Sheriffs Kerns, Sample and Douglas, five Records of Deportable ALIEN FORMS filled out for each alien that had been deposed and Border Patrol Form Sheets entitled ALIEN SMUGGLING CASE, File number A 22 826 124. See Supplemental Excerpt of Record.

No where in these Reports was there any

mention of these additional illegals being interviewed by the Sheriff's Deputies or Border Patrol with regard to the instant charge nor was there any indication that the aliens were voluntarily deported.

4. Upon review of this material, I called Assistant U.S. Attorney Brian Leighton and inquired as to the status of the illegal aliens who were not mentioned in the indictment and requested that he review the file for any additional discoverable material.

5. On February 14, 1980, Mr. Leighton delivered additional Discovery which dealt with an alleged prior similar offense in 1978, a memorandum from a Border Patrol Agent, Chacon, dealing with a telephone call not related to this case, and pictures of the Appellant and the aliens that were the subject of the indictment.

6. During the week of February 18, 1980, I was orally advised by Assistant U.S. Attorney

Brian Leighton and Fred Lenz of the Border Patrol that an additional 7 aliens had been arrested along with the 5 that were detained and that the 7 other aliens were voluntarily deported to Mexico. I requested the addresses of these aliens and was advised that the Border Patrol had no specific addresses for these aliens other than the city they came from. During this period I recieved an additional Report of Deputy Sheriff Sample setting out some of the names of the aliens voluntarily deported.

7. Prior to February 21, 1980, Assistant U.S. Attorney Leighton was advised that I would request a continuance on this basis. I further indicated that I would make a motion to Dismiss on the basis of U.S. v. Mendez-Rodriquez, 450 F2d 1 (9th Cir. 1971) and entered into an oral agreement with Mr. Leighton that the motion would be made at the time of trial on February 28, 1980, and pending on the outcome of the motion, the

trial would be held on Stipulated facts. The Clerk of the Court and Judge Crocker were notified of this agreement and concurred.

8. The Appellant attempted to locate the witnesses deported and was successful in locating at least 2 of the witnesses, both of whom would have given testimony favorable to the Appellant.

9. On February 21, 1980, the jury trial was continued to February 28, 1980, prior to the case being called on the regular daily calendar with the agreement of Judge Crocker.

10. On February 27, 1980, the Government filed its written motion opposing the motion to Dismiss that was to be heard on February 28, 1980.

11. The Appellant speaks very little English and did not understand the importance of certain facts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of September, 1980, at Fresno, California.

Anthony P. Capozzi

EXHIBIT "C"

CERTIFICATE OF SERVICE

I hereby certify that a typewritten copy of the Brief for Petitioner in the above-captioned case has been served upon those listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 12th day of January, 1981, to:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(3 copies)

U.S. Attorney
c/o Brian C. Leighton
1130 "O" Street
Fresno, California 93721
(1 copy)

Clerk of the Supreme Court
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543
(original plus 40 copies)

FRESNO DAILY LEGAL REPORT

By T. M. Webster Jr.